Section 15. Adverse Impact

C. The Law: Sources of the Legal Standards for Adverse Impact Cases

1. Statute and Regulations

FEHA (Government Code) Sections 12940(a), 12943 and 12944.

Commission Regulations Sections 7286.7(b), 7287.4(a) and (e), 7289.5.

2. Precedential Decisions

DFEH v. County of Santa Clara, Sheriff's Department (Trujillo) FEHC
Dec. No. 80-24. National Origin (Mexico) - failure to hire as
administrative analyst. Pre-selection examination had an adverse
impact on persons of Mexican descent. Employer's burden to show
validity of selection procedure and unavailability of less adverse
alternatives.

DFEH v. City and County of San Francisco (Lewis; San Francisco Fire
Fighters Local 798, International Association of Fire Fighters,
AFL-CIO, et al.) FEHC Dec. No. 82-11. Class action complaint. Race
(Black) - promotion denials to lieutenant position due to adverse
impact of promotional exam. Legal standard required to make finding
of adverse impact: sufficient to show "gross" disparity with "80
percent rule" (statistical significance desirable but not necessary).

3. Non-Commission Cases

Griggs v. Duke Power Co., 401 U.S. 424, 3 FEP 175 (1971). Title VII
proscribes practices that are fair in form but discriminatory in
operation; "business necessity" defense available if employer can
sustain burden of demonstrating job-relatedness.

Albemarle v. Moody, 422 U.S. 405, 10 FEP 181 (1975). Successful
"business necessity" defense must show that selection procedure
job-related. Burden on employee to show an alternative selection
device exists that would have a less adverse impact.

Dothard v. Rawlinson, 433 U.S. 321, 15 FEP 10 (1977). Adverse impact
demonstrated by absence or disproportionately low presence of members
of a protected group compared to their substantial presence in the
surrounding population.

Castaneda v. Partida, 430 U.S. 482 (1977). Adverse impact
demonstrated by "statistical significance": selection rate for the
protected group is greater than two or three standard deviations from
the expected rate.

Connecticut v. Teal, 457 U.S. 440, 29 FEP 1 (1982). Rejected "bottom
line" theory as applied to pass/fail barriers: disagreed with lower
court's holding that if total selection process does not have an
adverse impact, individual components having impact need not always be

validated. Court held that a pass/fail test which was not job-related would unlawfully classify employees into those eligible and ineligible for promotion.

Watson v. Fort Worth Bank and Trust (1988) U.S. 108 S.Ct. 2777 [46 EPD 38,065]. Court held that disparate impact analysis is not restricted to objective selection procedures; subjective employment practices that create statistical disparities violate Title VII, even if no discriminatory intent is present (Caucasian supervisors systematically hired fewer Black applicants, assigned lower performance ratings to Black employees, and promoted Black employees at a slower rate than their Caucasian counterparts).

Wards Cove Packing v. Atonio (1989) U.S. 110 S.Ct. 38 [107 L.Ed. 2d. 9]. Court ruled that: 1) statistical underrepresentation would must be demonstrated by contrasting the racial composition of the jobs at issue with the pool of available, qualified minority candidates (not with the workforce in general); 2) plaintiffs must identify the specific employment practice that has an adverse impact; 3) once a statistical disparity is shown the burden of proof does not shift to the employer. Rather, the employer need only carry the burden of producing evidence of a business justification for the challenged employment practice. NOTE: There are distinctions between the standards enunciated in this case and those followed by the Department and Commission. See DFEH v. County of Santa Clara Sheriff's Department, FEHC Dec. No. 80-24 and FEHC Regulations 7287.4(a).

4. Court Decisions on Commission Cases

City and County of San Francisco v. Fair Employment and Housing Commission (1987) 191 Cal.App.3d 976. Decision affirmed.